Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 20-6259

JOE N. BRADDY, JR., APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, MEREDITH, and JAQUITH, *Judges*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

The appellant, Joe N. Braddy, Jr., through counsel appeals a July 21, 2020, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to an initial disability rating in excess of 10% for status-post old post-traumatic ligamentous calcification parallel to medial metaphyseal region distal femur, also described as degenerative joint disease, of the left knee from July 21, 2009, to June 1, 2017. This matter was referred to a panel of the Court to address whether the Board, when it adjudicates entitlement to a higher initial disability rating for a service-connected condition, is required to address whether an intervening VA regional office (RO) decision severing service connection for that disability was proper if an appeal as to the severance decision was not perfected. The Court heard oral argument on February 3, 2022. As explained below, the Court now seeks supplemental briefing from the parties.

By way of background, the RO awarded service connection for a left knee condition in 2010 with a 10% rating effective July 2009, and the appellant has since that time sought a higher initial disaibility rating. *See, e.g.*, Record (R.) at 2567, 2705, 2731-36. Meanwhile, VA sought additional evidence to determine whether the award of service connection had been based on clear and unmistakable error and, in a separate claim stream, ultimately severed service connection effective June 2017. *See, e.g.*, R. at 1483-84, 1494-97, 2645. Because the appellant did not perfect an appeal of the severance decision and because 38 C.F.R. § 3.400(*o*)(1) prohibits the retroactive award of increased benefits after service connection has been severed, the Board in the decision on appeal concluded that a rating in excess of 10% for the period 2009 to 2017, when service connection was in effect, must be denied as a matter of law. R. at 11-12.

At oral argument, counsel for the appellant described the procedural history of this case as "a convoluted series of events" that the appellant, who was represented before the Agency by only a veterans service organization, "understandably would have had difficulty following." Oral

Argument at 18:49-19:05, available at https://www.youtube.com/watch?v=d1mGiDkrt4w. Notably, the record of proceedings in this case includes the following documents:

- A December 2012 Statement of the Case (SOC) continuing the assigned 10% disability rating for the appellant's left knee disability, in which VA advised the appellant that VA was in the process of considering whether his compensation should be discontinued based on conflicting medical evidence. R. at 2603.

- A February 2013 Substantive Appeal, in which the appellant indicated that he wished to appeal all issues listed on the SOC. R. at 2567.

- A May 2015 rating decision continuing the assigned 10% disability rating for the left knee disability. R. at 1955-56.

- A March 17, 2017, RO decision severing service connection for the left knee disability, effective June 1, 2017, in which the RO advised the appellant that, to initiate an appeal, he needed to complete and return an enclosed Notice of Disagreement (NOD) form. R. at 1476-84.

- A March 21, 2017, Supplemental SOC (SSOC) continuing the 10% disability rating for the period between July 2009 and June 2017. R. at 1465-75. The RO noted that "[s]ervice connection has now been severed effective June 21, 2017"; cited § 3.400(*o*)(1) as providing that a retroactive increase cannot be awarded after severance of service connection; and found that the 10% rating would be continued based on painful motion of the knee. R. at 1472. In the cover letter accompanying the SSOC, VA advised the appellant that, if he wished to continue his appeal of the assigned rating to the Board and he had already filed a formal appeal, "[his] response to the SSOC [was] optional." R. at 1463.

- The transcript of an August 18, 2017, hearing before a Board member reflecting that the issue on appeal was an initial rating in excess of 10% for the left knee disability from July 2009 to July 2017. R. at 1112. The appellant testified as to, and the Board member asked questions regarding, the severity of his knee condition. R. at 1111-22. The transcript does not reflect any discussion of severance or the effect of § 3.400(*o*)(1).

- An August 2017 NOD from the appellant regarding the March 2017 severance decision. R. at 1107-09.

- A December 2017 Board decision, in which the Board found that the appellant's appeal of the proper rating for his left knee disability was "intertwined with the severance issue" (to which the appellant had filed an NOD in August 2017) and therefore remanded the matter of the proper rating for the left knee disability for the period between July 2009 and June 2017. R. at 1053, 1055.

- A November 2018 SOC confirming the March 2017 severance decision. R. at 923-47. The accompanying cover letter advised the appellant that, to complete his appeal, he "must" file

a formal appeal to the Board within 60 days of the date of the letter or his case would be closed. R. at 921.

- An October 2019 application for a total disability rating based on individual unemployability, in which the appellant included his left knee disability among the service-connected conditions that affect his ability to work. R. at 354.

The Board is obligated to ensure that it provides claimants fair process in the adjudication of their claims. *Smith v. Wilkie*, 32 Vet.App. 332, 337 (2020) (citing *Thurber v. Brown*, 5 Vet.App. 119 (1993); *Bernard v. Brown*, 4 Vet.App. 384, 392-94 (1993)); *see Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("The entire veterans claims adjudication process reflects the clear congressional intent to create an Agency environment in which VA is actually engaged in a continuing dialog with claimants in a paternalistic, collaborative effort to provide every benefit to which the claimant is entitled."). As the Court has previously noted, the principle of fair process extends beyond statutory and regulatory requirements, *Smith*, 32 Vet.App. at 337, and "creating a procedural right in the name of fair process principles is primarily based on the underlying concepts of the VA adjudicatory scheme," *Prickett v. Nicholson*, 20 Vet.App. 370, 382 (2006), *aff'd sub nom. Prickett v. Mansfield*, 257 F. App'x 288 (Fed. Cir. 2007). In that regard, "even in situations where no particular procedural process is required by statute or regulation, the principle of fair process may nonetheless require additional process if it is implicitly required when 'viewed against [the] underlying concepts of procedural regularity and basic fair play' of the VA benefits adjudicatory system." *Smith*, 32 Vet.App. at 337 (quoting *Thurber*, 5 Vet.App. at 123).

Based on the information and evidence currently before the Court, it is unclear whether VA did explain or should have explained to the appellant that he would be barred as a matter of law from receiving a higher rating for the 2009 to 2017 period if the severance decision stayed intact; whether the RO and the Board by addressing the merits of his request for a higher rating for the 2009 to 2017 period without discussing the effect of severance suggested that such an increase was possible even if the severance decision stayed intact; and what remedies may be available if the appellant was not afforded fair process during the course of the proceedings leading to the Board decision on appeal. Accordingly, the Court will order the Secretary to file a supplemental brief, not to exceed 20 pages, "not counting the table of contents; the table of authorities; any appendix containing superseded statutes, rules, and regulations, and unpublished authorities; and the certificate of service," U.S. VET. APP. R. 32(e), addressing whether the appellant was provided with fair process in this matter and, if not, the proper remedy. *See Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done."). The Court will also require the appellant to file a supplemental reply brief, not to exceed 10 pages, "not counting the table of contents; the table of authorities; any appendix containing superseded statutes, rules, and regulations, and unpublished authorities; and the certificate of service," U.S. VET. APP. R. 32(e), responding to the Secretary's arguments.

Upon consideration of the foregoing, it is

ORDERED that, within 21 days of the date of this order, the Secretary file a supplemental brief as described above. It is further

ORDERED that, within 14 days of the date on which the Secretary files his supplemental brief, the appellant file a supplemental reply brief as described above. It is further

ORDERED that proceedings are otherwise stayed pending further order of the Court.

DATED: March 8, 2022 PER CURIAM.

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)